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**Trade Perspectives in Institutional Economics:
*John R. Commons, his work, and the protective tariff***

Katherine T. Gillis

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Faculty Advisor: Dr. Jonathan Levy

Preceptor: Dr. John McCallum

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Abstract

John R. Commons was one of the leading academics of the institutional economics movement whose legacy and influence is felt to this day in the work of labor legislation, collective bargaining agreements, the Legal Realist movement and of course the institutionalist movements (both old and new). He published many works over his tenure, and touched upon wide-ranging topics of economic policy. Despite this, and despite the host of secondary literature dedicated to understanding Commons' work and the institutionalists writ large, few (if any) have attempted to analyze Commons' opinions on the highly contentious protective tariffs of the Progressive Era. Tariffs and trade law exist at the intersection of regional politics, tax policy, international relations, trade-unionism, manufacturing, and industry failures —and as a result are particularly relevant to work of labor economists and economic institutionalists such as Commons. And though they are not at the center of his work, tariffs come up repeatedly in his treatises.

Given that Commons is known as a staunch advocate for the working man, one might suspect that he favored protective tariffs for the positive impact they could have on laborers' wage rates. However, through analyzing his publications, it is clear that Commons was pessimistic about their design in theory and critical of their effects in practice. He utilizes an "institutionalist" approach to consider tariffs as they shifted throughout his lifetime and as a reflection of the legal and economic interests they serve. In his most prominent publication *Institutional Economics*, he dismisses Classical economic understandings of tariffs as either a necessary staple of fiscal policy (as it is presented by Mercantilism) or a cardinal obstruction of prosperity (as it is presented by Adam Smith). Commons' observations in *Institutional Economics* are reasoned, and tempered. But he does not reserve himself and his condemnation of tariffs in a report published around the same time on the sugar tariff. The result is a full picture of each aspect of "the tariff question" that Commons disfavors and a prime example of Commons' institutionalist approach.

Introduction

Who were the institutional economists and for what did they advocate? A quick survey of the literature would reveal that the original institutionalists include the likes of Thorstein Veblen, John R. Commons, Wesley C. Mitchell, Richard T. Ely, and Edwin R. Seligman, among others. However—answers to the latter question may not be quite so easily captured. “*Regarded as a family of theories that share the thesis that ‘institutions matter’ in the study of economics,*”¹ institutional economics emerged in the late-nineteenth century and then, after a brief ascendance during the Progressive Era, fell out of favor in the shadow of neoclassical and Keynesian traditions.² Perhaps as a result of their marginalization, the academic legacy of the institutionalists is almost as disjointed as their commonalities are loosely defined. Despite this, the institutional economists are a fascinating subject of study, interest in whom has been sustained by academics across disciplines who continue to revisit their contributions.

My principle research question in approaching this topic was to explore what the institutionalists, as a movement, believed with respect to trade policy. (Trade and tariff policy was, as it remains, a hot political topic with significant implications for U.S. markets and industries—and Progressive Era ideals paved the way for changes to tax policy and executive power that shifted the landscape of tariff legislation to this day.) Of course, what I quickly found to be true is that the institutionalists are far from a monolith—perhaps less so than virtually any other academic school. And though John R. Commons was certainly not the only institutionalist to write about tariffs, reading his work through this lens proved to be the most revealing. Through reviewing his work, I came to find that his opinion on tariffs runs counter to intuition.

¹ Chavance, Bernard. *Institutional Economics*. London; New York: Routledge, 2008. 1. (emphasis added)

² Rutherford, Malcolm. *The Institutional Movement in American Economics, 1918-1947*. Science and Social Control. New York: Cambridge University Press. 2011.

John R. Commons is considered one of the two foundational academics of the institutional economic movement—following the philosophical father of the movement, Thorstein Veblen. To this day, the legacy of institutionalism honors both Veblen and Commons in tandem through the eponymous “Veblen-Commons award.” And though they share preeminence at the helm of institutionalism, Veblen’s and Commons’ work differed greatly. Veblen approached economics very theoretically and carved out the foundation of institutionalism through criticism of classical economics taxonomical, pre-Darwinian methods. In contrast, Commons was a pragmatist, and concerned himself with the way that institutions affected the working-class man. Commons’ foremost concern was with labor and collective bargaining actions, and a significant portion of his research revolved around legal institutions and legislation. Although his work did not center *the tariff question*, tariffs overlap significantly with the issues of trade unionization and bargaining, and he spoke on the subject considerably.

Prior to examining Commons’ work with an eye toward his opinion on tariffs, my initial impression was that of a left-leaning economist with a rational legal mind and with a singular priority of the working man. His work on labor legislation advocated for shifting the balance of political power through the use of collective bargaining. He highlighted “economic power” and “bargaining power” to acknowledge the distortions to power dynamics that exist between workers and management and worked to remedy those imbalances through labor legislation and the courts.³ It seemed to me that an extension of this intervention would naturally apply to the concept of the protective tariff, and Commons would be in favor of these trade restrictions. However, a close-reading of Commons’ body of work reveals that he is overtly critical of the “vexed question of tariffs.”⁴

³ *Legal Foundations of Capitalism*

⁴ (1905) Trade Unionism and labor problems, p. 290

Commons reveals several different rationales as to why he is critical of protective tariffs. Foremost, Commons is critical of tariffs because they are not an efficient remedy for protection. This could be that it is only protective on an international scale and does not protect American laborers from competition between states; or because it does not go as far as the Australian tariff, for example, to ensure that workers receive the benefits of the tariff.⁵ His comments on the tariff throughout his career suggest that he also may not agree with conventional perspectives on their economic effects—which may, in part, explain why Commons does not favor the tariff. Furthermore, Commons appears cynical about the lobbying process through which tariffs are enacted, and he is critical of the wealth generated by giants within protected industry. When framed in the context of trade history in the Progressive Era and the politics that surrounded it, his pessimism appears validated. And though Commons does not refer to many specific policy examples of the protective tariff, where he does—for example, with sugar tariffs—he is extremely clear on his position.

This paper will proceed in five sections: first, with a literature review of key related texts; next, with an overview of Commons' work, its place within economic institutionalism, and his academic legacy; followed by a brief overview of trade history during the Progressive Era; then, a section analyzing his direct statements on tariffs; and finally, conclude by drawing connections through the life and work of Commons to shifts in tariff policy that occurred during that time. Looking at this collection of Commons' remarks—taken within the context of then-contemporary trade history—it is clear that Commons has applied an institutionalist framework to critique a central aspect of classical economic theory. When considered this way, perhaps it is not quite so surprising that Commons is staunchly, anti-tariff.

⁵ Commons, John R. *Industrial Goodwill*. New York: McGraw-Hill, 1919. 174.

Literature Review

The secondary literature on Commons is extensive, as is the literature on trade history— however, there is next to nothing that has been written on the intersection of Commons and trade. Therefore, the literature review for this paper required tackling the two subjects separately, with a stronger focus on the secondary literature analyzing the work of John R. Commons and the institutional economic movement. Among the works that I analyzed with respect to the institutionalist movement are: *The Institutionalist Movement in American Economics, 1918-1947* by Malcolm Rutherford; *Thorstein Veblen and the Institutionalist* by David Seckler; and *Institutional Economics* by Bernard Chavance.⁶ For literature that focuses on John R. Commons, I reviewed: *A Worker's Economist: John R. Commons and His Legacy From Progressivism to the War on Poverty* by Commons-scholar, Dennis Chasse; *Contemporary Meanings of John R. Commons's Institutional Economics: An Analysis Using a Newly Discovered Manuscript*, edited by Hiroyuki Uni; and a large number of book reviews and articles critiquing the work of Commons both during his lifetime and long thereafter.⁷ As for my sources pertaining to trade history, I relied upon the work of Douglas Irwin, *Clashing Over Commerce: A History of US Trade Policy*; Ajay Mehrotra, *Making the Modern American Fiscal State: Law, Politics, and the Rise of Progressive Taxation, 1877-1929*; and Herbert Hovenkamp's *The Opening of American Law: Neoclassical Legal Thought, 1870-1970*.⁸

⁶ Chavance, Bernard. *Institutional Economics*.; Rutherford, Malcolm. *The Institutionalist Movement*; and Seckler, David William. *Thorstein Veblen and the Institutionalist: A Study in the Social Philosophy of Economics*. Boulder: Colorado Associated University Press, 1975.

⁷ Chasse, John Dennis. *A Worker's Economist: John R. Commons and His Legacy From Progressivism to the War On Poverty*. New York, NY: Transaction Publishers, 2017.; Uni, Hiroyuki. *Contemporary Meanings of John R. Commons's Institutional Economics: An Analysis Using a Newly Discovered Manuscript*. Singapore: Springer, 2017.;

⁸ Irwin, Douglas A. *Clashing Over Commerce: A History of US Trade Policy*. Chicago: The University of Chicago Press, 2017.; Mehrotra, Ajay K. *Making the Modern American Fiscal State: Law, Politics, and the Rise of Progressive Taxation, 1877-1929*. Cambridge: Cambridge University Press, 2013.; and Hovenkamp. *The Opening of American Law*

The literature that I reviewed on the institutional economists gives depth to the individual contributions of Commons on the overall school of institutionalism. Chavance summarizes that, “[Commons’] approach consists of developing institutional economics by combining the ‘insights’ of the economics schools of the past with a theoretical construct based on the institutional innovations that had occurred in American capitalism.”⁹ In David Seckler’s book, *Thorstein Veblen and the Institutionalists*, Seckler credits Commons with expanding the scope of institutionalist ideas by insisting that, “no two men could be more different than Veblen and Commons.”¹⁰ Veblen critiqued Classical Economic Theory for its lack of scientific methodology, and introduced darwinian principles to economic theory; in contrast, Commons concerned himself with the functional ways that economic institutions had evolved. Seckler goes so far as to describe these different approaches as separate “wings” of institutionalism, and that “there was no consistent doctrine.”¹¹ Rutherford’s account gives context to Commons’ place within institutionalism in a different way. Rutherford gives a detailed narrative of Commons’ rise to preeminence at The University of Wisconsin, where he “made Wisconsin’s institutionalism,” through a research career in collective bargaining for labor legislation with a very hands-on, activist agenda.¹² These works create a cohesive narrative of a core institutionalist, who shaped the movement in many ways during his unconventional path through academia. They are a necessary component to understanding Commons’ life work, and help inform an understanding of “institutionalist thought.”

Dennis Chasse’s *A Worker’s Economist: John R. Commons and His Legacy From Progressivism to the War on Poverty*, published in 2017, is both the most recent and most

⁹ Chavance., 21.

¹⁰ Seckler, 5.

¹¹ Seckler., 9

¹² Rutherford., 187-190.

thorough biographical account of Commons life.¹³ The other Commons-focused title, *Contemporary Meanings of John R. Commons's Institutional Economics*, is a collection of seven essays, compiled by members of the Japanese Association for Economic Evolution (JAE), unpacking, and analyzing a rediscovered manuscript written by John R. Commons in 1927, “Reasonable Value: A Theory of Volitional Economics.”¹⁴ The value of this manuscript is highlighted by editor Hiroyuki Uni, who illuminates that, “the process through which Commons formulated his theory became hidden as a result of him discarding his manuscripts after retiring from the University of Wisconsin” and this rediscovered manuscript, “therefore provides invaluable clarification of the processes through which his theory was constructed.”¹⁵ The biographical literature and academic attempts to ‘fill in the gaps’ both go to show how there are still many aspects of Commons’ life and work that are, as of yet, unknown. The relatively few number of full books dedicated exclusively to Commons may contribute to that mystery.

In addition to the aforementioned titles is one collection, *The Journal of Economic Issues*. The JEI, which has been in print since 1967 is the official academic journal of the Association for Evolutionary Economics—the organization of economists following in the tradition of Veblen and Commons.¹⁶ While the number of articles that the *JEI* has published on Commons’ work is too great to take under full consideration here, it serves as a repository of institutionalist scholarship over the past half-century. And though the existence of the Association for Evolutionary Economics demonstrates that there is strong interest in the institutionalist tradition, my research did not yield any results for articles relating to Commons and tariffs or foreign trade.

¹³ for the only other biography written about Commons, see: Harter, Lafayette G. Jr. *John R. Commons, His Assault On Laissez-faire*. Corvallis: Oregon State University Press, 1962.

¹⁴ Uni, Hiroyuki. *Contemporary Meanings*, v.

¹⁵ *Id.*, vi.

¹⁶ Association for Evolutionary Economics. Accessed October 14, 2021. <https://afee.net/>.

For the history of trade law, I reviewed the works of Douglas Irwin, Ajay Mehrotra, and Herbert Hovenkamp. Irwin's book *Clashing Over Commerce* is a staple of trade history scholarship. Irwin gives an in-depth account of the history of trade legislation in the U.S. with a focus on the political process and the many sides of each debate. *Clashing Over Commerce* provides the core timeline of each tariff act—many of which were renegotiated every few years—and even makes reference to Commons specifically in his contribution to the conversations on the sugar tariff prior to the passing of Smoot-Hawley.¹⁷ The density of information presented in Irwin's book is enriched when read in tandem with Mehrotra's *Making the Modern American Fiscal State* and Hovenkamp's *The Opening of American Law*. Both of these two books are more focused in their scopes. Mehrotra's work is an innovative accounting of the political environment, events, and landmark legislation that led to the adoption of a progressive taxation system. *Making of the Modern American Fiscal State* depicts how dramatically reliance on tariff-revenue shifted in the wake of the enactment of a progressive income tax in 1916. Throughout, Mehrotra emphasizes the contribution of institutionalist thinkers Ely and Seligman to the shifting landscape of fiscal policy during this period—and also makes particular mention of Commons and his unique contribution to the legal foundations of the new fiscal state.¹⁸ Hovenkamp's work, *The Opening of American Law*, is less of a book on trade history and is more of a legal history. Hovenkamp credits Commons with influencing the jurisprudence of contract law and managerial bargaining transactions in such a way that “long outlived institutionalism” and “continues to influence our thinking about labor.”¹⁹ Hovenkamp also introduces the school of Legal Realism, which emerged out of the work of institutional economists, and which I argue shaped trade law.²⁰

¹⁷ Irwin. *Clashing Over Commerce*. 383

¹⁸ Mehrotra. *Making the Modern American Fiscal State*. 289.

¹⁹ Hovenkamp. *The Opening of American Law*. 90.

²⁰ in my term paper for Amy Dru Stanley's “U.S. Legal History” colloquium, Fall 2020

John R. Commons: his work and legacy

John R. Commons had a long and prolific career—one which has continued to influence the field of economics to this day. However, Commons initially struggled to get his foot in the door of the academy. He held a series of short appointments in the departments of sociology at Oberlin College, Indiana University, and Syracuse University, but was dismissed on account of his radical views. After which, he went on to get involved with the National Civil Federation (NCF), where he gained experience with collective bargaining actions and labor contracting. This experience is what prompted Richard T. Ely to appoint Commons to the faculty of the economics department at the University of Wisconsin.²¹ Commons' experience with collective bargaining and labor contracting became a pillar of his academic research, and he went on to shape the economics department at the University of Wisconsin for decades.

One of the major research endeavors that Commons took on as a professor at the University of Wisconsin was the effort that eventually led to his two most notable written works—*Legal Foundations of Capitalism* and *Institutional Economics*. Regarded by Commons as two parts of one whole, the entirety of this research stemmed out of the search for the answer to the question, “what do the courts mean by reasonable value?”²² The need to answer this question came from the extensive legislative consulting on labor policy that Commons undertook with the help of his graduate students. (A work attributed to Commons encompassing this research, called *Principles of Labor Legislation*, was published post-mortem on his behalf.)²³ In many ways, these titles were Commons' life work—which he describes as thirty-five years in the making

²¹ Rutherford. *The Institutional Movement*. 186-222.

²² Commons, John R. (John Rogers). *Legal Foundations of Capitalism*. Madison: University of Wisconsin Press, 1959. vii.

²³ Commons, John R., and John B. (John Bertram) Andrews. *Principles of Labor Legislation*. 4th rev. ed. New York: A. M. Kelley, 1967.

prior to the publication of *Legal Foundations*, and another ten years before the publication of *Institutional Economics*. Accordingly, *Legal Foundations of Capitalism* and *Institutional Economics* stand out within Commons' oeuvre and are recognized among the most important contributions to the field of economics to this day.²⁴

In *Legal Foundations of Capitalism*, Commons lays out his definitions for economic concepts such as transactions and property. These chapters portray an evolution in the concepts of value and property, as recognized by U.S. Supreme Court cases, to outline imbalances in economic power, and ultimately theorize what Commons refers to as the “Working Rules of Going Concerns.”²⁵ Part two provides a historical framework for understanding the structural issues of rent, wages, and price related to Commons' experiences with collective bargaining—culminating in a chapter on the history of public purpose and its moral evolution.²⁶

Institutional Economics, which was published ten years later, follows up this heavily theoretical treatise by promising to explicate that theory in practice. *Institutional Economics* is an impressive accomplishment for its sheer size, alone. In over 900 pages, Commons covers the development of Classical economic theory—writing in detail on the work of John Locke, Quesnay, Hume, Peirce, Smith, Bentham, Blackstone, Malthus, and Ricardo—before outlining his theory of reasonable value, and contextualizing it within the institutionalist movement.²⁷ Commons also touches on the contributions of Marx, Proudhon, and the school of psychological economists, as well as other institutional economists, and concludes his work with a discussion on communism, fascism, and capitalism.²⁸

²⁴ Chasse., *A Worker's Economist*.

²⁵ Commons, John R. *Legal Foundations of Capitalism*. Madison: University of Wisconsin Press, 1959.

²⁶ This paragraph is revised from an essay I wrote for SCTH 39010 in Winter 2021

²⁷ Commons, John R., and Malcolm Rutherford. *Institutional Economics: Its Place in Political Economy*. New York ; London: Routledge, 2017.

²⁸ *Id.*

In a recent edition of *Institutional Economics*, Rutherford introduces the book as the pièce de résistance of Commons' lifework, following an "evolution" of theories that can be traced through his earlier works: "From the very beginning of his career Commons was concerned with the development of conceptual and theoretical ideas, and one can trace an intellectual evolution in Commons' work that operated through the *testing* and subsequent modifying of his ideas in the light of his practical experiences."²⁹ Rutherford outlines how Commons' hands-on experience with labor unions and collective bargaining between his earlier works and his canonical *Legal Foundations of Capitalism*, "deeply affected his earlier views... on how particular institutions functioned and how the needed compromise between social classes could best be accomplished."³⁰ Furthermore, since many of the notes and manuscripts from Commons' years teaching did not survive (with the exception of the recently discovered 1927 manuscript), the auxiliary publications to his main works provide the best perspective into Commons thought process and commentary throughout his life.

In its exhaustive scope, *Institutional Economics* gives the most detailed account of Commons' views on tariffs. However, his comments on tariffs begin with his first publication *The Distribution of Wealth* (1893)³¹—and continue through a handful of his many other works: *Trade Unionism and Labor Problems* (1905), *Labor and Administration*, (1913), *Principles of Labor Legislation* (1916), *History of Labor in the United States* (1918), *Industrial Goodwill*

²⁹ Commons, Rutherford., *Institutional Economics*. xv.

³⁰ Id., xvii.

³¹ Commons, John R. *The Distribution of Wealth*. New York: Macmillan and Co., 1893.

(1919), *Industrial Government* (1920), and *State Minimum Wage Laws in Practice* (1924).³² Commons also served as a contributing editor, with an editor's introduction, to Lippert S. Ellis's *The Tariff on Sugar* (1933).³³ And though these works are valuable for a close-read of Commons' views on tariffs—they are largely overlooked in the grand scheme of Commons scholarship.

It was the publication of *Legal Foundations of Capitalism* and *Institutional Economics* that set forth a new direction within the institutionalist movement and cemented Commons' legacy. Commons' detailed analysis of the legal institutions that intersect with economics stood in contrast to the pure philosophizing of Veblen's work. As a result, the movement split into those who followed Veblen's institutionalism and those who followed Commons'. Seckler presents a clear understanding of these differences, as follows: "Institutionalism is divided into two great wings superficially united by the antipodal minds and personalities of Veblen and Commons...Both wings centered in the end on institutions: Veblenians because of the role of institutions in the grand march of history; the followers of Commons because of institutions as obstacles and instruments of reform."³⁴ According to Seckler, later institutionalists would have been brought up in either one tradition or the other—which is likely part of the reason to blame for the discontinuity of institutionalist thought and ongoing debates about the institutional economists and what they believed.

³² Commons, John R. *Trade Unionism and Labor Problems*. Boston: Ginn & Company, 1905.; Commons. *Labor and Administration*. New York: Macmillan, 1913.; Commons, and John B. (John Bertram) Andrews. *Principles of Labor Legislation*. 4th rev. ed. New York: A. M. Kelley, 1967.; Commons, et al. *History of Labour in the United States*. New York: The Macmillan Company, 1918.; Commons. *Industrial Goodwill*.; Commons. *Industrial Government*. New York: The Macmillan company, 1921.; National Consumers' League, Felix Frankfurter, Mary W. Dewson, and John R. Commons. *State Minimum Wage Laws in Practice*. [New York: [s.n.], 1924.

³³ Ellis, Lippert S. (Lippert Spring), John R. Commons, Benjamin Horace Hibbard, Walter Albert Morton, and Freeport Rawleigh foundation for public service. *The Tariff On Sugar*. Freeport, Ill.: Rawleigh Foundation, 2005.

³⁴ Seckler, 5.

Although Commons' works did garner praise for their significant detail, innovation, and the volume of research that is reflected—they were largely criticized in reviews for verbosity and inaccessibility.³⁵ Among the reviews of *Legal Foundations of Capitalism* were many comments such as, “much of the material is mystifying rather than enlightening...almost impossible to secure a unified conception of his course of reasoning,”³⁶ and “our only wish is that the author... write a book which will be nearer to the plane of the average intelligent reader.”³⁷ The reviews for *Institutional Economics* were similarly skeptical and even in his recent introduction, Rutherford acknowledges, “the view of Commons' writings... as particularly obscure, full of unfamiliar terminology, and requiring great effort to understand... [*Institutional Economics*] length, organization, and style make it quite daunting, and most of its potential readership... have probably never opened its pages, being dissuaded by its awful reputation alone.”³⁸ Given the consistency with which Commons' work received negative reviews, it is all the more impressive that they, and he, have retained significance.

³⁵ see Ashley, Wm. Review of *Review of Legal Foundations of Capitalism*, by John R. Commons. *The Economic Journal* 36, no. 141 (1926): 84–88.; Dunning, John C. Review of *Review of Legal Foundations of Capitalism*, by John R. Commons. *The Journal of Social Forces* 2, no. 5 (1924): 759–61.; Harbold, William H. Review of *Review of Legal Foundations of Capitalism*, by John R. Commons. *The Western Political Quarterly* 11, no. 4 (1958): 897–98.; Halbwegs, Maurice. Review of *Review of Legal foundations of capitalism*, by John R. Commons. *L'Année Sociologique* (1896/1897-1924/1925) 1 (1923): 800.; Henderson, Gerard C. Review of *Review of Legal Foundations of Capitalism*, by John R. Commons. *Harvard Law Review* 37, no. 7 (1924): 923–27.; K., E. M. Review of *Review of Legal Foundations of Capitalism*, by John R. Commons. *The Sewanee Review* 33, no. 3 (1925): 364–66.; Mitchell, Wesley C. “Commons on the Legal Foundations of Capitalism.”; Rowell, Richard R. Review of *Review of Legal Foundations of Capitalism*, by John R. Commons. *American Bar Association Journal* 10, no. 9 (1924): 678–79.; Sharfman, I. L. “Commons's Legal Foundations of Capitalism.” Edited by John R. Commons. *The Quarterly Journal of Economics* 39, no. 2 (1925): 300–312.; and Tawney, R. H. Review of *Review of Legal Foundations of Capitalism*, by John R. Commons. *Economica*, no. 13 (1925): 104–5.

³⁶ Sharfman, I. L. “Commons's Legal Foundations of Capitalism.” 302-03.

³⁷ Rowell, Richard R. Review of *Review of Legal Foundations of Capitalism*, by John R. Commons. 679.

³⁸ Commons., and Rutherford. “Introduction to the Transaction Edition” *Institutional Economics*. x

Tariff Policy in the Progressive Era

In economic and legal histories of the Progressive Era, trade history often takes a backseat to more dominant narratives of corporate consolidation and ensuing antitrust regulation, labor rights, and tax reform.³⁹ And though trade policy is not often the first topic that comes to mind when historians characterize the era, it was a consequential and driving force in its day. During this period, loosely defined from 1890 to 1930, there were pivotal changes to trade law. Tariff policy played a role in each of the historical developments of corporate consolidation, antitrust laws, and the implementation of an income tax. Debates advocating for or against tariffs were divided along party lines, and they were often highly contentious—with muckrakers accusing politicians of catering to special interests and corruption.⁴⁰ These polarized dynamics produced a succession of Tariff Acts throughout the Progressive Era that raised and lowered duty rates erratically up until the *Reciprocal Trade Agreement Act of 1933*.⁴¹

The tariff policy debate was heavily tied up in the discussion of American capitalism and corporate consolidation. Traditionally, Republicans favored higher tariff rates, and argued that it protected the American worker by helping to maintain higher wages. On the other side, Democrats suggested that high tariffs increased the cost of living and raised questions about the role of tariffs in creating industry tycoons. Their theory was that high tariff rates protected the larger players from foreign competition, allowing them to effectively outcompete smaller players until they had a monopolistic hold on domestic industry. This theory gained traction when,

³⁹ Portions of this section originated in a term paper I produced for a course taught by Amy Dru Stanley entitled “Colloquium: U.S. Legal History” in the fall quarter of 2020

⁴⁰ Tarbell, Ida. *The Tariff in Our Times*. New York: Macmillan, 1911.

⁴¹ McKinley Tariff Act of 1890 (raised tariff rates); Wilson–Gorman Tariff Act of 1894 (lowered rates); Dingley Tariff Act of 1897 (raised rates); Payne–Aldrich Tariff Act of 1909 (lowered rates-marginally); Revenue Act of 1913/Underwood-Simmons Tariff Act of 1913 (lowered rates); Emergency Tariff Act of 1921 (raised rates); Fordney-McCumber Tariff Act of 1922 (raised rates, delegated power to President)

“sugar magnate Henry O. Havemeyer famously confessed in 1899 that the protective tariff was ‘the mother of all trusts.’”⁴² Similarly, in 1908, Andrew Carnegie publicly declared that the tariff on iron and steel could be eliminated without harm to U.S. Steel production.⁴³

The economic environment shifted significantly from the late nineteenth-century, and with the rise of manufacturing industry giants, tariff policy became a pivotal issue in the 1908 presidential election. In a break from the traditional Republican position, William Taft ran for president on a platform of willingness to revise tariff rates downward. Taft put forward a compromise in which “the tariff should be set to ‘equalize the differences in the cost of production between domestic and foreign producers.’”⁴⁴ However, when Taft entered the office, the congressional Republicans charged with drafting the legislation were less reform-minded and produced a bill for President Taft that was significantly less progressive than he had promised.⁴⁵ The *Payne-Aldrich Tariff Act of 1909* was widely considered a failure, and Taft lost re-election as a result.

In simultaneity with calls for more progressive tariff policies, support for a progressive income tax grew. In 1913, Congress passed the sixteenth amendment, constitutionally allowing for a direct income tax. That same year they passed the Revenue Act of 1913, also called the *Underwood-Simmons Tariff Act*, which imposed a direct income tax and slashed tariff rates from, on average, forty percent down to twenty-seven percent.⁴⁶ Prior to the passage of the sixteenth amendment and adoption of a direct income tax, tariffs made up the vast majority of federal revenue. That share dropped considerably with the advent of an income tax. “Whereas customs

⁴² Mehrotra. *Making of the Modern American Fiscal State.*, 50.

⁴³ Irwin. *Clashing Over Commerce.* 316.

⁴⁴ Mehrotra. *Making of the Modern American Fiscal State.*, 320.

⁴⁵ *Id.*, 320-322.

⁴⁶ Irwin. *Clashing Over Commerce.* 339.

duties and excise taxes together raised roughly ninety percent of federal receipts in 1880, by 1930 they generated only a quarter of total national revenue,” thereby reorienting the dynamics of the tariff policy debate.⁴⁷ Instead of being a tax relied upon for generating federal revenue, the tariff became purely a policy measure of protection.

Tariffs evolved in more ways than one during this era. In addition to the shifting dynamics of federal revenue, the *Fordney-McCumber Tariff Act of 1922* introduced changes to the way that tariff schedules were set.⁴⁸ After a series of emergency tariffs bills were perceived as unsuccessful up through 1921, concern grew about, “the inability of Congress to adjust tariff rates in a timely way in light of rapidly changing circumstances.”⁴⁹ The 1922 act sought to solve this problem by appointing a Tariff Commission, that was tasked with investigating and updating tariff schedules along a flexible rate. This mechanism was one of the first instances where Congress delegated trade powers that were constitutionally granted to it.⁵⁰ These delegated powers were expanded in the *Smoot-Hawley Tariff Act of 1928* and finally, institutionalized in the *Reciprocal Trade Agreement Act of 1933*—which initiated a trend of trade powers delegated from Congress to the executive that has only continued to increase over the last century.⁵¹

This brief overview serves as a background with which to contextualize the commentary in the following section. The most important takeaways are: (1) that the debate over tariffs was fraught with political agendas, (2) that the legislation itself was constantly shifting, and finally, (3) the issue was so hot that it could make or break politicians. This period in tariff history is arguably the most consequential and set the stage for expanded executive power over trade.

⁴⁷ Mehrotra, *Making of the Modern American Fiscal State*. 7.

⁴⁸ Irwin., *Clashing Over Commerce*.

⁴⁹ *Id.*, 356.

⁵⁰ for further evidence to this point, see *J.W. Hampton Jr & Co v. United States* (1928)

⁵¹ Irwin, *Clashing Over Commerce*; Masters, Jonathan. “U.S. Foreign Policy Powers: Congress and the President.” Council on Foreign Relations. March 2, 2017.

Commons and the tariff question

Given Commons' notoriety as a labor economist and advocate for the "working man"—one might expect that he favored the protective tariff. After all, protective tariffs are by definition meant to protect domestic industries from the competitive advantages that foreign markets may pose. Commons himself understood this argument when he admitted, "there is one advantage which the American workmen have in the matter of foreign competition...the entire Union is able through the protective tariff to restrict the competition of the longer workdays and lower wages of European and Asiatic labor, and thus to make it possible to raise the level of wages and to reduce the limit of hours to the furthest extent that domestic competition will permit."⁵² Additionally, protective tariffs were popular among the labor unionists for whom Commons advocated. Despite this, Commons took exception to the protective tariff for many reasons.

While Commons' critiques are numerous, they generally take shape in one of two ways: either the protective tariff is corrupt and misguided in its intent, or it falls short and is condemnable in its effect. Commons' foremost criticism is that protective tariffs are ineffective tools for protecting laborers. One reason for this may be because many trade laws were not written with the intent to protect laborers. Commons suggests that this is because protective tariffs were initially intended to protect capital, not labor; and in many other cases, they were simply a product of corrupt lobbying practices. He takes a very "institutionalist" approach to evaluate the tariffs, not just in theory, but also in outcome. Regardless of their legislative intent, Commons condemns the results of protective tariff rates for consolidating wealth and power in the hands of a few business leaders. He seems to insinuate that any benefit protective tariffs may enure to the working man are insufficient and outweighed by their detriments.

⁵² Commons. *Trade Unionism and Labor Problems*. 466.

From the beginning of his publishing career, Commons set the tone of objecting to protective tariffs. In his work, *The Distribution of Wealth*, he spared no words when he stated:

A catalogue of the special methods by which business men of certain low grades of morals succeed in out-bargaining the consumer and thus securing profits for themselves, would make an interesting study. It is only necessary to mention such business as the manufacture of patent medicines and similar articles, the adulteration of food products, and the manufacture of shoddy goods of various kinds—to say nothing of lobbying for tariff duties—to indicate what a fruitful field these methods furnish to those whose moral stands will permit them to enter it.⁵³

By drawing moral equivalences between the legal actions of manufacturing patented medication and lobbying for tariff duties, and the (I can only assume—fraudulent) actions of adulteration of food products and manufacturing “shoddy goods,” Commons disapproves of tariffs in a way that leaves little need for reading between the lines. Any remaining doubt would give way before his explicitly low opinion of businessmen who stoop to this level. This remark certainly reveals a negative view toward the self-serving nature of lobbying, but it is somewhat surprising that he would extend this criticism to labor organizations seeking protection through lobbying for tariffs. One explanation is that Commons is reacting to the observed reality of tariff lobbies, and his condemnation is reserved for the consolidation of wealth that occurred in protected industries.

Commons goes on in *The Distribution of Wealth* to liken tariffs to other “hinderances” to market functions—similar to “patents, monopolies, trade-union restrictions, or any other regulation or restriction of human devising.”⁵⁴ His argument here is that such “artificial causes” result in an uneven production of goods in one sector over another, distorting prices, and thus, causing friction in the economy.⁵⁵ This critique takes a step back from the moral absolutism of his first comment, but it speaks to a category of criticism that he expands upon in later works.

⁵³ Commons. *The Distribution of Wealth*. 266.

⁵⁴ *Id.*, 136-7

⁵⁵ *Ibid.*

Commons confronted tariffs again in his 1905 book *Trade Unionism and labor problems*. It it, he makes the previously mentioned comment regarding “European and Asiatic labor”—however, he makes clear that: “it is questionable whether [the protective tariff] has really as great weight as the competition of different states in the American Union among themselves,” and that “a single state with advanced labor legislation cannot protect itself against the cheap labor and long workday of another state.”⁵⁶ The discussion in question revolves around a conversation on reducing the hours of the workday; and Commons appears to be evaluating the protective tariff in its success on that merit alone. As previously quoted, he does acknowledge the possible benefit that such tariffs have had on protecting American wages against European and Asian competition—but with the caveat that these gains are limited by domestic competition between states with different standards in labor legislation. This begs the question—if the protective tariff is not enough to shield American laborers from competition—what then?:

In the absence of legislation the only effective means of securing a reduction of hours is through labor organization. This is, of course, the method by which in recent years the most significant and important reductions in the United States have been secured. The concentration of effort on this point for the past fifteen years by the American Federation of Labor has already accomplished notable results.⁵⁷

Without a federal program to standardize labor laws across the national stage, Commons claims that protection from tariffs is not enough to effectively secure their goals. Therefore, tariff or not, the concerted effort of organized labor would be necessary to advance the agenda of shortening the workday. In this instance, Commons is not critiquing the tariff on its face, but demonstrating how it is an ineffective tool for protecting American workmen. This critique echoes his economic critiques from *Distribution of Wealth*, with greater depth as to why tariffs are insufficient.

⁵⁶ Commons. *Trade Unionism and labor problems*. 466.

⁵⁷ *Id.*, 467

The relationship between labor organizations and the tariff question continues to surface in Commons' 1919 publication *Industrial Goodwill*. In it, Commons describes a cyclical dynamic of labor organizations and conditions in the economic environment.

During the rise in prices and profits labor becomes aggressive. Labor unions are organized, short and successful strikes multiply, wages are advanced without strikes. During the fall in prices labor unions are less aggressive, strikes on a falling market are less successful, and laborers turn to politics, protective tariffs, socialism, panaceas or even revolution....The recovery after 1880 and the ups and downs since that time are reflected in the enlargement of trade unionism when labor has been in demand, and political and socialistic panaceas when unemployed... Each period of depression and unemployment for a hundred years has seen this rivalry of capitalistic politicians and labor politicians for the support of labor...In America it has been contests over protective tariffs, greenbackism, silver, monopolies, and control of the courts.⁵⁸

This snapshot of labor organization in the American economy leaves the impression that labor unions were a major force with which to be reckoned. Tariffs are positioned as a tool employed to protect labor when capitalist forces fail—and the implication appears that it is the labor unions themselves who are advocating for, and receiving, protective tariffs during those down times.

Commons' criticism of protective tariffs seems to go against the popular opinion of labor unionists. However, turning to Commons' work, *History of Labor in the United States, vol. 2*, reveals that sentiments on the tariff question were also split among trade unionists. In one example regarding the organization "Knights of Labor"—the iron and steel workers' union threatened to disaffiliate from the AFL over a resolution that they passed condemning certain tariffs.⁵⁹ "The legislative committee was thereupon authorized to reply that the action of the convention of 1882 signified not a condemnation of protection, but merely an expression of a desire to keep the Federation altogether out of the tariff controversy."⁶⁰ Though Commons does

⁵⁸ Commons. *Industrial Goodwill*. 171, 174.

⁵⁹ Commons. *History of Labor in the United States, vol 2*. 329-330.

⁶⁰ *Ibid*.

not explicitly tease this out, it is fairly straightforward to explain this incident and its result. Protective tariffs were a polarizing topic, with staunch advocates both for and against, because their effects were not felt evenly. Laborers from a protected industry would understandably feel an existential connection to the fate of the tariff debate (despite Commons' critical judgment on their inefficacy), and the AFL would need to remain neutral if it wanted to represent working people across different industries. It is plain to see how these debates would become so charged—but Commons explains that tariffs were not always considered a tool for protecting labor, which may also justify his aversion to them.

What had initially been introduced as a measure to aid infant industries as they grew became a necessary and permanent fixture of the economy. In *Industrial Goodwill*, Commons makes the case that “Beginning with the protective tariff after 1840, American labor began to have national importance against the cheap labor of Europe. Public opinion had changed so that when the new tariffs came in, the purpose was no longer protection of capital but protection of labor.”⁶¹ In his earlier work, *Labor and Administration*, Commons traces the roots of this philosophical shift to the work of Republican House Representative and founder of the New York Tribune, Horace Greeley.

The tariff arguments of his boyhood had been capitalistic arguments. Protect capital, their spokesmen said, because wages are too high in this country... Greeley reversed the plea: protect the wage-earner, he said, in order that he may rise above his present condition of wages slavery. The only way to protect him against the foreign pauper is to protect the price of his product. But, since capital owns and sell this product, we needs must first protect capital. This is unfortunate, and we must help the laborer as soon as possible to own and sell his product himself. “We know right well,” he says, “that a protective tariff cannot redress all wrongs...The extent of its power to benefit the Laborer is limited by the force and pressure of *domestic* competition, for which Political Economy has as yet devised no remedy...”⁶²

⁶¹ Commons. *Industrial Goodwill*. 31.

⁶² Commons. *Labor and Administration*. 32.

Greeley’s criticism of the limited effect of protective tariffs against domestic competition mirrors that of Commons in *Trade Unionism and labor problems*. It seems likely that Commons was influenced by Greeley in this way. Ironically, Commons appears to be more aligned with Greeley in this case than he is aligned with many trade-unionists.

Commons goes on to credit Greeley with influencing the philosophical foundations of pro-tariff Republicanism. “The foregoing quotations from Greeley depict the evolution of the theory of the protective tariff out of the Whig theory into the Republican theory. The Whig idea was protection for the sake of capital. Greeley’s idea was protection for the sake of labor.”⁶³ It is here that Commons seems to differ from Greeley. Although Commons and Greeley shared similar critiques, Greeley advocates for the continued use of protective tariffs—with different aims—whereas Commons seems to find them repugnant in both their aim and outcomes. Still, Commons conveys an uncharacteristic amount of respect for how “Greeley aggressively adopted the legislative program of the workingmen”⁶⁴—particularly given their opposing politics.

For the most part, Commons does not frame economic theory on overtly partisan terms. His dialectical style means that his works often approach political topics with a very formula-forward, matter-of-fact objectivity. His two most-cited works *Legal Foundations of Capitalism* and *Institutional Economics* are prime examples of this. However, Commons does not hide his politics either. In the first two-thirds of *Institutional Economics*, Commons draws through-lines in the history of economic thought, culminating with his theories and the institutionalist movement. The issue of tariffs comes up time and again in each school of economic thought, stemming out of Mercantilism, where they take root:

⁶³ Commons. *Labor and Administration*. 47-50.

⁶⁴ *Ibid.*

The purpose of the Mercantilists was to show how the monarch or legislature might best promote the national interest by promoting the interests of merchants through protective tariffs...thus creating such a favorable balance of exports over imports as would bring gold and silver into the country at the expense of other nations. The Mercantilists flourished in the Seventeenth Century... Indeed, they continue to flourish today; but the modern names of the school are Nationalism, Protectionism, Fascism, Nazism, or the Republican Party.⁶⁵

Commons begins with Mercantilism and uses it as one of his reference points through which to describe subsequent economic theories. In the above quotation, he traces the ideology of protectionism to Mercantilism, and then names political proponents of that protectionist ideology. This baseline gives the reader a lens through which to understand the differences in each economic theory, where each theory may fall on that political spectrum, and how they may align on the question of tariffs.

The other notable benchmark from which to draw distinctions is, of course, Adam Smith. Commons describes Adam Smith's economic theory as "[taking] over the physiocrats' doctrine of free trade and their opposition to Mercantilism," and, "he [Smith], like Quesnay, condemns all statutory regulations by governments, all tariffs, all restraints of custom, and even calls in question the support by taxes of free education and its consequent subjection to politics."⁶⁶ Thus, Smith provides another useful point of reference to understand where economists fall on the tariff debate. If the Mercantilists sit at one end of the spectrum, Smith sits at the other. But how, if at all, does this help one understand Commons' personal ideology on tariffs?

At the end of the day, Commons was a pragmatist—and as many pragmatists do, he fell somewhere in the middle of the spectrum. In the latter chapters of *Institutional Economics*, Commons finally gets around to outlining his theory of reasonable value. In the section on

⁶⁵ Commons. *Institutional Economics*. 110-111

⁶⁶ Id., 111, 166.

taxation, he makes use of the protective tariff as an example of an “extreme case” of taxation.⁶⁷

In this account, Commons does not take a strong stance one way or another as to whether tariffs are morally good or evil, but outlines their fluid nature:

In periods of continued rising prices the free trade policy comes to the front and is usually able to reduce tariffs; but that in periods of generally falling prices the popular demand for still higher tariffs is overwhelming and all nations raise their tariff walls against the falling prices of imports from other nation... Most protective tariffs in American and foreign history have accompanied or immediately followed a period of falling prices. And recently, notwithstanding all expert opinion in different countries and even diplomatic agreements of international good-will, the high tariff is the popular protest of a whole people against falling prices... Thus the public policy of tariff taxation, although usually condemned by the static analysis as pyramiding the tariff costs upon the ultimate consumer, does not always do so. The policy rather follows the ups and downs of general world-wide movements of prices...⁶⁸

This take on the protective tariff is refreshingly mild given how strong of a stance most tariff debates appear in the literature. Commons abandons the purely theoretical evaluation of protective tariffs, and instead he applies the institutionalist framework to observe how tariffs exist in practice. The reality he finds is that tariff policy is often a facet of popular opinion more than it is reflective of economic expertise and best-practices. Commons explains it as a cycle with an inverted relationship to price—tariffs go up when prices go down (in other, competitive markets), and tariffs go down when prices go up (to mitigate the cost of living). He paints it as a policy function for price controls, rather than a concept worthy of centering in economic theory. Commons usual critiques—that tariffs are ineffective at accomplishing economic goals or “injurious” in practice—are perhaps more relevant when tariffs are simply a matter of policy.⁶⁹ Furthermore, as a policy matter, Commons calls into question the legitimacy of protective tariffs that are openly not intended for generating revenue.

⁶⁷ Id., 836.

⁶⁸ Id., 837

⁶⁹ Ibid.

Although it was not a commonly-held belief, some legal scholars took issue with the overtly protectionist language in the *Fordney-McCumber Tariff Act of 1922*, and arguments arose that a tariff that is enacted purely for the purpose of protection, and not for generating revenue, is not a tax at all.⁷⁰ Commons seems to join this conversation and cast doubt on the legality of protective tariffs in a discussion on the police powers of taxation in *Institutional Economics*:

Indeed, it is well recognized that taxes and tax exemptions operate like the police power, and are often consciously employed for the regulation of industry, morals, or welfare, rather than the acquisition of public revenue...Furthermore, we may add, under the decisions of our courts, taxation is a somewhat privileged exercise of the police power, since, considering that it is the principal means of collecting revenue on which the very life of the state depends, the courts do not always scrutinize captiously the incidental regulative effect of taxes. **This is seen in their permissive attitude towards a protective tariff which evidently is not a tax for revenue but a tax for the transfer of values from one class to another class.** This is what the police power does in its guise of control over foreign commerce by the protective tariff.⁷¹

Commons' cynical side reemerges in this quotation. He suggests that courts do not appropriately scrutinize the legality of economic regulations put forth by the government in which they serve. As if that were not enough of a packed statement, Commons goes on to allude to the age-old—but unprevailing—opinion, calling into question the legality of tariffs that are enacted with the explicit purpose of protecting domestic industries. Though Commons was not a lawyer by formal training, he studied case law through his research and commanded respect in the legal world for his contributions to labor legislation and through his seminal *Legal Foundations of Capitalism*. As Hovenkamp advanced, Commons influence on legal jurisprudence—particularly the American Legal Realism movement—may have been even greater than his influence to the discipline of economics.⁷² Therefore, his comment should not be dismissed outright.

⁷⁰ Reeder, Robert P. “The Constitutionality of Protective Tariffs.” *University of Pennsylvania Law Review and American Law Register* 76, no. 8 (1928): 974–79.

⁷¹ Commons. *Institutional Economics*., 820. (Emphasis added)

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In the context of examining Commons' work for his sentiment on tariffs, few criticisms will rise to the level of seeding doubt as to their constitutionality. However, this last example of Commons on the tariff question is his most direct and most damning yet. Contributed as one of three editors to a report on the sugar tariff in 1933, Commons co-authored an introduction that left nothing unsaid:

The sugar tariff is an excellent example of the manner in which tariffs can thwart and obstruct international commerce, divert industry from its natural course, twist the channels of trade into tortuous and unwholesome paths, and introduce confusion and uncertainty into international trade to the benefit of no one—not even thought for whose protection they are levied. It has stimulated overproduction, encouraged high-cost producers behind its protective wall, made possible long hauls to unnatural markets, and penalized efficient producers on our own shores; but it has brought neither stability nor profit to the sugar industry.⁷³

Even though it is not guaranteed that Commons authored these words himself, his name is signed on it, and it received his stamp of approval for publication. This example brings together all of the other more-subtle criticisms that Commons had expressed thus far: that the sugar tariff has had an “artificial” effect on market forces by stimulating overproduction; that it has protected high-cost producers (possibly like the aforementioned sugar magnate Henry Havermeyer); and that it has not benefited those that it was intended to protect.

Throughout his career, Commons reckons with protective tariffs amidst an uneven backdrop of shifting sentiments, political turmoil, and failed tariff legislation. Commons focuses his understanding on tariffs through their development and realized outcomes, as opposed to the soundness of their underlying economic premise. As a result, he carves out his own lane on tariffs that stands in contrast to preceding economic theories. His opinion can be conveyed as being skeptical, at best, cynical, at worst, on tariffs *in theory*, and definitively negative on tariffs in practice.

⁷³ Ellis, et. al. *The Tariff On Sugar*. 15.

Conclusion

John R. Commons left an impressionable legacy on the institutional economic movement and has remained a figure of intrigue for many scholars, but not all of his opinions are accessible at first glance. His sentiments on trade and protective tariffs are woven into his encyclical works, buried by his tautological style, and have not been paid much attention in the secondary literature. On first thought, my expectation was that his experience with trade-unionism and advocacy for the working man would make him a proponent of protectionist tariffs. However, upon review of his works and the trade history at the time during which he wrote them—it became abundantly clear that Commons disfavored protective tariffs of any kind.

From corruption to illegitimacy, inefficacy to limitations—Commons repeatedly puts forth his critical opinion of protective tariffs. Commons takes issue with virtually every aspect of the protective tariff in some way or another throughout his publications. First, he morally condemns the businessmen who lobby for protection. Then, he points to the fact that these tariff protections are limited exclusively to international markets, and therefore domestic competition is still a factor. Similarly, he describes that where they do work, they do not go far enough, and further labor organization is required to secure protections for the working man. He lambasts the sugar tariff for its failures in practice, and makes a point of the unnatural market dynamics that emerge from protected industries. These criticisms are parsed throughout Commons' works, and unless they are taken together and considered as such, they may not convey the level of depth with which Commons' criticisms run. And though his particular sentiments are not always clear (on account of his verbosity and stylized delivery), the overall impression is rock solid. Commons underlying opinion can be summarized as skeptical in theory, and negative in reality.

His negativity toward tariffs remain relatively consistent throughout his publications, but it is not until the end of his career that he takes a stronger stance in a publication advocating against a particular tariff policy. Tariffs appear to him as economically inefficient, ineffective at protecting laborers, and with high potential for corruption in their implementation. Even if one could improve tariffs in their execution, I believe he would still prefer that the energy expended on legislating tariffs be redirected to collective bargaining and securing protections for laborers through maximum workday hours and minimum wage laws. This is because tariffs will always be susceptible to price cycles, and create artificial economic conditions. Therefore, Commons' negative opinion on protectionist tariffs does not have to run counter to his desire to protect laborers. When taken with the context that tariffs were not always intended to protect laborers, and that in practice they created economic confusion and political turmoil (including among trade-unionists), it is understandable that Commons did not consider them vital to accomplishing his advocacy goals. All things considered, examining Commons' work through this lens not only sheds light on how tariffs figure into his economic theory, but understanding his negative opinion on tariffs also contributes to a deeper understanding of his brand of institutionalism.